DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

Case Number 92 CR 917, Division JDZ

County Court Case Number 91T9042, Division C

JUDGMENT ON APPEAL

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

CHARLES BRADLEY,

Defendant-Appellant.

This matter comes before the court on the defendant's appeal from the County Court in and for Jefferson County of his conviction of Driving under the Influence. The court has reviewed the briefs of the parties and the record of the proceedings that have been submitted. The court finds it is adequately advised in the matter, deems oral argument unnecessary, and enters the following judgment on appeal pursuant to the procedures in C.R.Crim.P. 37 and C.R.S. 13-6-310.

The record shows that the defendant was driving on Highway C-470 on May 24, 1991 at about 7:30pm. Sergeant Northrup of the Colorado State Patrol stopped the defendant after observing him make an abrupt right turn without a turn signal. After noticing a strong odor of alcohol on the defendant's breath, Sergeant Northrup notified Trooper Hurley, also of the Colorado State Patrol. Trooper Hurley soon arrived on the scene and observed the defendant perform several roadside maneuvers. Based on his training, experience, and observations of the defendant, Trooper Hurley arrested the defendant for driving under the influence. The defendant chose to submit to a breath test.

The record shows that the two analyses that were conducted of the defendant's breath test yielded different results: the analysis conducted through the Colorado State Patrol yielded a result of 0.194 grams of alcohol per two hundred ten liters of breath; the result of defendant's laboratory conducted yielded a result of 0.167. The defendant's expert, a Dr. Wingeleth, testified at trial that because there is more than a fourteen percent difference between the two results, he could not within a reasonable

degree of scientific certainty make a valid determination of the defendant's intoxication at the time the test was taken. (L25, P213-LL1-7, P214).

On cross-examination, the trial court allowed the prosecutor to question Dr. Wingeleth about the consistency of defendant's performance on his roadside sobriety maneuvers and other observations of the defendant with the two alcohol levels of 0.194 and 0.167.

The defendant argues on appeal that it was improper for the trial court to allow the prosecutor to cross-examine Dr. Wingeleth on these issues. The court concludes that C.R.E. 611(b) and 702 are applicable to the resolution of this issue. C.R.E 611(B) states:

> (b) Scope of cross-examination.
>
> Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

The court concludes that the scope and limits of cross-examination are within the sound discretion of the trial court and absent an abuse of that discretion the rulings of the court will not be disturbed on review. People v. Raffaelli, 647 P.2d 230, 234 (Colo. 1982).

The trial court in this case, in its discretion, allowed the prosecutor to inquire into the additional matters of the consistency of certain behaviors with the alcohol levels produced by the defendant's breath tests. On direct examination, defense counsel questioned Dr. Wingeleth extensively about the unreliability of both breath test results. It was therefore appropriate for the trial court to allow the prosecutor to cross-examine the expert on why those tests may hae indeed been reliable. The court cannot find that the trial court abused its discretion in allowing the prosecutor to cross-examine Dr. Wingeleth on these issues.

The court further concludes that C.R.E. 702 is applicable to the resolution of this issue. Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

> determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The court finds that it was appropriate for the trial court to allow the prosecutor to cross-examine the defense expert on the issue of the consistency of the defendant's behavior with the two breath test results pursuant to Rule 702. The trial court determined that the expert's knowledge in this area would assist the jury to understand a fact in issue, namely, whether the defendant was driving under the influence on May 24, 1991. With Dr. Wingeleth's qualifications, there was no question that he was qualified to render the opinions he did on cross examination. The court cannot find the trial court acted improperly in allowing the prosecutor to cross-examine the defense expert in the manner she did.

The defendant's reliance on People v. Perez, 745 P.2d 650 (Colo. 1987) and Huctchinson v. People, 742 P.2d 875 (Colo.1987) is misplaced. In those cases, the Colorado Supreme Court held it was improper for the People to call in

its case-in-chief an expert previously retained by the defense. In this case, the People did not call Dr. Wingeleth in their case-in-chief; rather, the trial court in its discretion allowed the prosecutor to cross-examine the defense expert on additional matters not directly raised on direct examination. The issue before the court is the propriety of the scope of cross-examination with the trial court allowed. The Perez and Hutchinson cases cited by the defense are not relevant to the resolution of this issue.

Therefore, it is the judgment of the court on appeal that the defendant's conviction of driving under the influence is ordered affirmed and orders this matter remanded to the County Court for enforcement of its judgment, unless there is further review by the Supreme Court upon writ of certiorari pursuant to the rules of that court.

BY THE COURT:
(hand dated 4/22/93)

s/ James D. Zimmerman
JAMES D. ZIMMERMAN
District Court Judge

[MAILING LIST OMITTED]